Supreme Court, U. S.
FILED
OCT 22 1974
MICHAEL RODAK, JR., CLERK

No. 73-717

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE,
APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

WALLACE H. JOHNSON,
Assistant Attorney General,

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General,

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Questions presented	1
Statement	2
Argument:	
I. The Agreement of May 9, 1891, was ratified by Congress and is binding on the State of Washington	5
II. State hunting laws are inapplicable to beneficiaries of the Agreement of May 9, 1891, in the absence of a showing of their necessity as a conservation measure	12
Conclusion	17

CITATIONS

Cases:

Butler and Vale v. *United States*, 43 Ct. Cl. 497	4
Choate v. *Trapp*, 224 U.S. 665	6
Fleming v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111	10
Geer v. *Connecticut*, 161 U.S. 519	15
Hunt v. *United States*, 278 U.S. 96	11, 16
Ivanhoe Irrig. Dist. v. *McCracken*, 357 U.S. 275	10
Lacoste v. *Department of Conservation*, 263 U.S. 545	15
McKelvey v. *United States*, 260 U.S. 353	11
Morton v. *Mancari*, No. 73-362, decided June 17, 1974	6
Morton v. *Ruiz*, 415 U.S. 199	11

Cases—Continued — Page

New Mexico State Game Commission v. *Udall*, 410 F. 2d 1197, certiorari denied, 396 U.S. 961 — 11
Perrin v. *United States*, 232 U.S. 478 — 7
Puyallup Tribe v. *Department of Game (Puyallup I)*, 391 U.S. 392 — 13, 14, 15
Seufert Bros. Co. v. *United States*, 249 U.S. 194 — 14
Seymour v. *Superintendent*, 368 U.S. 351 — 2
Squire v. *Capoeman*, 351 U.S. 1 — 6-7
Tulee v. *Washington*, 315 U.S. 681 — 14
United States v. *Gratiot*, 14 Pet. 526 — 11
United States v. *Ramsey*, 271 U.S. 467 — 11
United States v. *Winans*, 198 U.S. 371 — 13, 14, 16
Utah Power & Light Co. v. *United States*, 243 U.S. 389 — 11
Ward v. *Race Horse*, 163 U.S. 504 — 14
Washington Game Dept. v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 — 14

Constitution, statutes, executive order and treaty:

U.S. Const., Art. VI, cl. 2 — 6
Act of March 3, 1871, 16 Stat. 544, as amended, 25 U.S.C. 71 — 6
Act of August 19, 1890, 26 Stat. 355 — 3, 7
Act of July 1, 1892, 27 Stat. 62 — 3, 8, 10, 11
Act of June 21, 1906, 34 Stat. 325 — 4, 9, 10, 11
34 Stat. 1015 — 4
35 Stat. 70 — 4
35 Stat. 781 — 4
36 Stat. 269 — 4

Constitution, statutes, executive order and treaty—Continued — Page

36 Stat. 1058 — 4
Pub. L. 83-280, 67 Stat. 588 — 7
Executive Order of July 2, 1872 (1 Kapp. 915) — 3
Treaty of Medicine Creek of 1854, 10 Stat. 1132 — 13
Treaty with the Yakamas of 1859, 12 Stat. 951 — 13
RCWA 37.12.060 — 7

Miscellaneous:

23 Cong. Rec. 3840 — 8
S. Rep. No. 664, 52d Cong., 1st Sess. — 8
S. Rep. No. 2561, 59th Cong., 1st Sess. — 4, 8, 9
U.S. Department of Interior, Bureau of Indian Affairs Map, *Indian Lands and Related Facilities as of 1971* — 10

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-717

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE,
APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether an agreement between the Colville Confederated Tribes and the United States by which the Tribes ceded a portion of their lands, reserving hunting and fishing rights therein, was ratified by Congress and is binding on the State of Washington.

2. Whether a provision of the Agreement stipulating that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians

shall not be taken away or in anywise abridged", exempts the members of the Tribes from state game regulations, unless the State affirmatively shows a need to restrict their hunting in the interest of conservation.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of February 19, 1974, inviting the Solicitor General to express the views of the United States in the case, the Court having noted probable jurisdiction on June 17, 1974.

Alexander Antoine and his wife, Irene, were convicted in the courts of the State of Washington for shooting and killing a deer during the closed hunting season fixed by state law. Their defense was that they killed the deer on land within the boundaries of the original Colville Indian Reservation on which they have the right to hunt subject only to tribal or federal regulation.[1] Mr. Antoine is an enrolled member of the Colville Confederated Tribes, which are recognized by the United States Government. Mrs. Antoine is a Canadian Indian and is not enrolled in the United States.[2]

[1] The status of the southern half of this reservation was the subject of *Seymour* v. *Superintendent*, 368 U.S. 351. This case, as explained within, concerns residual rights in the northern half.

[2] Before the State courts, the State apparently did not contest that both Mr. and Mrs. Antoine are entitled to the rights of members of the Colville Tribes on the property in question, if such rights encompass hunting free of state regulation. See App. 18, 20-21. In those circumstances, it may now be estopped from raising the issue of Mrs. Antoine's status. See Brief of Appellee, pp. 10 n. 9, 21 n. 22.

By Executive Order of July 2, 1872 (1 Kapp. 915), President Grant established a reservation for Indian tribes which subsequently formed the Colville Confederated Tribes. Pursuant to an Act of August 19, 1890 (26 Stat. 355), a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of * * *." The commission entered into an agreement with the Tribes dated May 9, 1891 (App. 4-11), in which the Tribes surrendered to the United States "* * * all their right, title, claim and interest in * * *" a tract of land constituting approximately the northern half of the reservation (App. 4, Art. 1). However, with respect to the ceded tract, Article 6 of the Agreement expressly provided that "* * * the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). Article 12 stipulated that the Agreement "shall go into effect from and after its approval by Congress" (App. 10). Further articles, among other things, granted the Indians a right to allotments on the ceded lands, and promised them a cash payment of $1,500,000, in five installments.

In 1892, without expressly ratifying the Agreement, Congress passed a law (Act of July 1, 1892, 27 Stat. 62), providing that the northern half of

the reservation was "vacated and restored to the public domain * * *," and was "open[ed] to settlement * * * [to be] disposed of under the general laws applicable to the disposition of public lands in the State of Washington" (*id.* at 63). The Act omitted any reference to Article 6 of the 1891 agreement, securing the right to hunt and fish, or to Article 11, providing a consideration of $1,500,000 for the land sold.

The Colville Tribes, recognizing that the government was not carrying out the terms of the 1891 Agreement, began to press for further action by Congress. See *Butler and Vale* v. *United States*, 43 Ct. Cl. 497; see also S. Rep. No. 2561, 59th Cong., 1st Sess. By the Act of June 21, 1906, 34 Stat. 325, 337-378, Congress reconsidered its prior action and authorized the payment of $1,500,000 for the land ceded to the United States. The 1906 Act recited, *inter alia*, that payment of the money was "[t]o carry into effect the agreement [dated May 9, 1891] * * * entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." The $1,500,000 authorized in the 1906 Act was actually appropriated for the Indians in five subsequent Acts, each providing $300,000: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1075. Each of these statutes is essentially identical and provides that the appropriation is (34 Stat. 1015, 1050-1051):

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by [the 1892 Act] * * * being a part of the full sum set aside * * * in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one*, * * *. [Emphasis added.]

In affirming appellants' conviction, the Supreme Court of the State of Washington held that the 1891 Agreement was a mere contract between the Indians and the United States, which does not bind the State of Washington (App. 30). The court also held that the Agreement, even if enforceable against the State, was not intended to exempt the Indians from state game laws (App. 30-31). We challenge both conclusions.

ARGUMENT

I

THE AGREEMENT OF MAY 9, 1891, WAS RATIFIED BY CONGRESS AND IS BINDING ON THE STATE OF WASHINGTON

The Agreement of May 9, 1891, was never intended to be complete in itself: by its terms it was to become effective "* * * from and after its approval by Congress" (App. 10). The initial question, therefore, is whether that subsequent ratification occurred. If so, the Agreement would have the same force as

an Act of Congress and thus became a law binding on the States. U.S. Const., Art. VI, cl. 2.

1. Contrary to appellee's argument (Br. 10-13), it does not matter that the agreement was made after the Act of March 3, 1871 (16 Stat. 544, 566, 25 U.S.C. 71) ending the practice of making treaties with Indian tribes. Congress's plenary power to legislate on the subject of Indian affairs and Indian property remained unaffected. See *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip. op. 16-17. So far as relevant here, the only effect of the 1871 law was that, henceforth, for purchases of land from Indian tribes, the consent of the House, as well as the Senate and President, would be required—in short, that an Act of Congress would be necessary to ratify an agreement. But an agreement so ratified is the supreme law of the land, just as a treaty would be.

This was settled by the Court shortly after the practice of making treaties with the Tribes was ended. In *Choate* v. *Trapp*, 224 U.S. 665, it was held that tax exemptions granted by an agreement between the United States and an Indian tribe made in 1897 as part of a cession of Indian lands, and ratified by Act of Congress, were enforceable against the State of Oklahoma. The Court also announced the rule that the terms of the Agreement and ratifying Act by which the Tribe ceded its land, even though creating a tax exemption which would ordinarily be interpreted strictly, should be liberally read in favor of the Indians. *Id.* at 674-677; see also *Squire* v. *Capoeman*, 351 U.S. 1. A few years later, in *Perrin* v. *United States*, 232 U.S. 478, the Court similarly upheld a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on the land ceded in the agreement. *Id.* at 480. These precedents are equally applicable to the reservation of hunting and fishing rights in an agreement relinquishing land.[3]

2. That Congress did ratify the 1891 Agreement is shown by the language of the Acts of Congress and their legislative history. The original intent was to purchase the northern half of the Colville Tribes' land under terms and conditions satisfactory to the Tribe. Indeed, it was Congress itself, by Act of August 19, 1890, *supra*, that authorized the President to appoint a commission to negotiate an agreement with the Tribes for the purchase of the land. Accordingly, an agreement was worked out and signed (App. 4-11). The next year, the House of Representatives voted to ratify the Agreement with certain changes.[4]

---

[3] We note also that the State of Washington, in assuming limited jurisdiction over Indians under Pub. L. 83-280, 67 Stat. 588, enacted RCWA 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

[4] Specifically, the House bill replaced the $1,500,000 lump sum payment called for in the agreement, with a payment of

To be sure, the Senate disagreed,[5] and (as we have seen) the 1892 Act provided no consideration for the Indians, and made no mention of the hunting and fishing rights preserved in the agreement. But that is not the end of the story.

This failure by Congress to live up to the terms of its agreement was before long widely seen as unacceptable. In addition to the Tribes' protest (see p. 4, *supra*), Mark Fullerton, who had been head of the commission that negotiated the treaty and then had become Chief Justice of the Supreme Court of the State of Washington, spoke out. In a letter reprinted in the Senate Report on the future 1906 Act (S. Rep. No. 2561, *supra*, at p. 140) he said:

> It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling

---

$1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The bill explicitly preserved the hunting and fishing rights guaranteed in the agreement. 23 Cong. Rec. 3840.

[5] The Senate contested the Indians' title to the Reservation on the ground that it had been created by Executive Order, and expressed unwillingness to pay for what was being taken. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Senate bill eventually became the Act of July 1, 1892.

> of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation.

The Department of the Interior also publicly favored a bill to carry into effect the Agreement of 1891 and assured the Congress that it had:

> * * * reviewed at some length the matter of the title of the Colville Indians * * * and * * * had not the slightest doubt as to the possessory rights of said Indians to the lands within the reservation, "rights which the courts have always recognized without qualification * * *." S. Rep. 2561, *supra*, at pp. 137, 139.]

And, finally, there were growing pressures to open to non-Indian settlement the southern half of the original reservation, an action to which the Tribes would consent only if the 1891 Agreement were fully carried out. See S. Rep. No. 2561, *supra*, at pp. 134-140.

These combined motives finally persuaded Congress to respond. And so, by the Act of June 21, 1906, 34 Stat. 325, 377-378, Congress authorized payment of $1,500,000 expressly "[*t*]*o carry into effect the agreement* bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *" (emphasis added). Later in the same session, in appropriating $300,000 of the authorized funds, Congress expressly referred to the 1906 Authorization Act as an Act "ratifying the agreement ceding

said land to the United States, under date of May ninth, eighteen hundred and ninety-one" (*supra*, p. 5). These enactments, we submit, fully qualify as a congressional ratification of the 1891 Agreement.[6]

3. The State of Washington argues (Br. 18-20) that when the land in question was opened to settlement by the Act of July 1, 1892, State jurisdiction vested and could not be revoked by the 1906 ratification of the 1891 Agreement. This, however, misconstrues the effect of a cession to the United States and ignores the continuing power of Congress.

The land after cession remained public land of the United States, except to the extent that patents were issued to homesteaders. Most of the ceded tract remains federal land today and is part of the Okanogan Colville National Forest.[7] Thus, in addition to its

[6] The Court has found congressional ratification of Presidential acts creating property rights on far less certain language. Compare *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. In *Confederated Tribes of the Colville Reservation* v. *United States*, Docket No. 181-C, pending before the Indian Claims Commission, the United States, relying upon the language of the Act of June 21, 1906, but not the subsequent appropriations Acts, argued that the 1906 Act did not constitute a ratification of the 1891 Agreement. Considering the Acts together, we now conclude to the contrary (and have so informed the Commission, while preserving our right to rely in that case upon the possibility that this Court in the present case may disagree with us).

[7] See U.S. Department of the Interior, Bureau of Indian Affairs Map, *Indian Lands and Related Facilities as of 1971*. We are lodging copies of the map with the Clerk and supplying copies to opposing counsel.

power to legislate for the protection of Indians wherever located (*United States* v. *Ramsey*, 271 U.S. 467, 471; *Morton* v. *Ruiz*, 415 U.S. 199, 236), Congress retained plenary authority over the use of public land. *United States* v. *Gratiot*, 14 Pet. 526, 537.[8] That power was amply sufficient to vindicate rights promised to the Tribes in the 1891 Agreement.[9]

[8] See, also, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404-405; *McKelvey* v. *United States*, 260 U.S. 353, 359. Even without statutory permission, Federal officials may kill deer on federal land in violation of state game laws, when the killing is for the good of the property, *Hunt* v. *United States*, 278 U.S. 96, or for the purposes of an environmental study, *New Mexico State Game Commission* v. *Udall*, 410 F. 2d 1197 (C.A. 10), certiorari denied, 396 U.S. 961. Here, of course, the Indians' right is protected by statute.

[9] The only person who might legitimately complain of the 1906 ratification would be someone who bought land in the ceded area between 1892 and 1906 in reliance on the 1892 Act, or his successor, assuming the reserved hunting and fishing rights apply to private property. But see 12, *infra*. Even such a purchaser, however, could not set aside the 1906 Act of Congress; his remedy would be to seek just compensation for any diminution of the value of his property resulting from the 1906 ratification of hunting and fishing rights.

II

STATE HUNTING LAWS ARE INAPPLICABLE TO BENEFICIARIES OF THE AGREEMENT OF MAY 9, 1891, IN THE ABSENCE OF A SHOWING OF THEIR NECESSITY AS CONSERVATION MEASURES

Assuming that the 1891 Agreement was ratified by Congress and therefore has the same force as a federal statute or treaty, the question becomes: What rights were guaranteed to the Tribes, and do they include the exemption from the State closed season law claimed here?

We must begin with the words of the Agreement. Article 6 provides "that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). That is strong language which, on its face, reserves an important privilege—especially so when we remember the historic dependence of these Tribes on hunting and fishing. To be sure, the right conceded is not made exclusive; it is to be enjoyed "in common with all other persons." But the guarantee is something more than a mere exemption from discrimination. The Indians are not only promised that they will legally share whatever hunting and fishing rights others may enjoy; they are guaranteed these rights absolutely, albeit without power to exclude others. The Agreement grants nothing to non-Indians; the State remains entirely free to prohibit hunting and fishing by all others; not so with respect to Indians, because they enjoy special rights immunized by federal law.

So much is well settled. Indeed, the principle was established on comparable language as long ago as *United States* v. *Winans*, 198 U.S. 371, and was reaffirmed as recently as *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392.[10] As the Court said in the latter case (391 U.S. at 397), quoting in part from the earlier decision (198 U.S. at 380):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" • • • would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

And, again: "The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State • • •." 391 U.S. at 398. Those decisions govern here. Indeed, this is a stronger case in light of the additional provision that the right "shall not be taken away *or in anywise abridged*." Emphasis added. Compare n. 10, below.

Does it follow then, that the Tribes are wholly exempt from *all* State regulation? Strict logic might

---

[10] *Winans* involved Article III of the Treaty of 1859 with the Yakamas (12 Stat. 951, 953) which, in pertinent part, reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

Puyallup involved Article III of the 1854 Treaty of Medicine Creek (10 Stat. 1132, 1133) which, in pertinent part, provided, with respect to the ceded lands:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory • • •.

lead us to that extreme. See *Ward* v. *Race Horse*, 163 U.S. 504, 514. But the Court has never gone so far. Although recognizing a unique easement in favor of the Indians over private lands to exercise their fishing rights (*Winans, supra; Seufert Bros. Co.* v. *United States*, 249 U.S. 194), a special immunity from State taxation (*Tulee* v. *Washington*, 315 U.S. 681), and an exemption from the prohibition of net fishing (*Puyallup I, supra; Washington Game Dept.* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44), some power of "regulation" has always been conceded to the States. Indeed, we believe the Court has sometimes been over-generous in recognizing State power.

What is clear is that, if federally protected Indians hunting and fishing rights are to have any meaning, the rule cannot be that "the State may do unto Indians as it may do unto all others." For, in that event, the Indian agreements and treaties would accord them no more than "equal protection"—a superflous gift—[11] and the rights expressly secured could be "taken away" or "abridged" with impunity, the

[11] We recognize that some passages in both *Puyallup* opinions can be read as defining the fishing rights at issue there in terms of a promise of "equal protection" or an immunity from "discrimination." See 391 U.S. at 398, 403; 414 U.S. at 48. Those expressions, however, cannot be supposed to indicate the Court's view that the express reservation of hunting and fishing rights in Indian cessions merely protected the Tribes from discriminatory State legislation. Else, the Court would not have endorsed the holding of *Winans* that those provisions cannot be construed as confirming "no rights but such as they would have without the treaty." 391 U.S. at 397. See *supra*, p. 13. See, also Puyallup II, *supra*.

State having plenary power absolutely to prohibit hunting and fishing by its non-Indian citizens—whether in the interest of conservation or not. See *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549. Nor may the State effectively abrogate the Indian rights by terming its action mere "regulation." At the very least, quantitive restrictions on the exercise of those reserved rights must be "in the interest of conservation" and must meet "appropriate standards," which insure that the interference is "reasonable and necessary." *Puyallup I, supra*, 391 U.S. at 398.

The precise contours of that formula have not been defined by this Court. We suggest that it must be a strict standard. After all, what was envisoned when the 1891 Agreement was made was that most members of the Tribes would retire to the southern portion of their reservation, but retain the unencumbered right to use the ceded portion as a "hunting ground," with the sole condition that they could no longer exclude others. Inevitably, that right is already much diminished by the influx of non-Indian settlers, and the resulting contraction of hunting areas[12] and the

[12] We take it for granted that State law may validly confine off-reservation hunting, for Indians and others alike, to areas where the activity will not endanger residents. In this case, moreover, appellants apparently claim no right to hunt on fenced private property. See App. 26. Indeed, since Article 6 of the 1891 Agreement expressly excludes "lands * * * allotted to * * * Indians" from the exercise of hunting and fishing rights, [redacted] it might well be argued that lands patented to [redacted] should enjoy the same exemption. One can distinguish between the easement over private land which

decrease in available game."[13] It would be unjust to permit further unnecessary dilution of what little remains of the old hunting rights of the Tribes.

In our view, the proper test is satisfied only when it is shown that the restriction—whether a total prohibition of hunting with respect to a particular species or a discrete "game reserve," the establishing of a "closed season," or the fixing of a numerical "bag limit"—*must be applied to Indians* in the interest of conservation. It is not enough that the regulation is labelled a "conservation measure." The State cannot abridge the Indians' federally protected rights without demonstrating a compelling need. No such showing has been attempted here. The State of Washington has not established that applying the ban on out-of-season hunting of deer on the land in question to the Colville Tribes is in any way necessary or even useful for the conservation of deer.[14] And it has not attempted to show whether, if some regulation is desirable, the taking of deer by Indians for private consumption need be prohibited, nor whether the Tribes' own conservation regulations are not ade-

subsists under *Winans*, *supra*, to reach and exploit "usual and accustomed" fishing places, and hunting within fenced property. Thus, the treaty construed in *Winans* reserved the right to *hunt* only "upon open and unclaimed land" within the ceded area. See 198 U.S. at 378.

[13] We also assume that necessary safety regulations can be imposed on Indian hunting. Of course, no such regulation is at issue here.

[14] Thinning a herd [redacted] may be useful to conservation. See *Hunt* v. *United States*, *supra*.

quate. We therefore agree with appellants that their criminal conviction was invalid.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

OCTOBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 881437 84